Supreme Court, U.S.
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No. 01-246

IN THE

Supreme Court of the United States

MARK MORTENSON,

Petitioner

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC., A NEVADA CORPORATION; J.A. BLACK CONSTRUCTION, INC., A NEVADA CORPORATION; AND JAMES A. BLACK

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Disabled Rights Action Committee, a Utah nonprofit corporation, respectfully responds to the Petition for a Writ of Certiorari ("Petition") filed by one of its members, Mark Mortenson, to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Petition was docketed on August 9, 2001 as No. 01-246. Under this Court's Rule 12.6, this Response in Support was due 20 days later, or August 29, 2001.

SUPPORTING REASONS FOR GRANTING THE PETITION

1. The Petition notes *some* of the injury occasioned this Respondent, the Disabled Rights Action Committee ("DRAC"), by the Ninth Circuit's decision (particularly, the deference being shown to the decision by HUD and the consequent dismissal of DRAC's administrative complaints). The injury to DRAC (and, certainly, to other "grassroots" civil rights groups), however, extends beyond the dismissal of housing discrimination complaints filed with HUD.

The limitations on standing occasioned by disregarding "intangible injuries" is not limited to *individual* civil rights plaintiffs. Where a membership civil rights organization (such as DRAC) files suit as a representative of its individual members, it stands in their shoes. Thus, any limitation on the standing of individuals directly impacts civil rights groups. Constrictions on representational standing are made more significant by the circuit courts' ever-narrowing application of the "diversion of resources" rationale available to civil rights groups for establishing standing in their own right. *See, Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). In order to establish standing in their own behalf, civil rights groups must show a diversion of resources from a group's non-litigation efforts. In some circuits, this requirement is

becoming increasingly difficult to meet as civil rights groups' expenditures on investigations for discrimination may not constitute an appropriate diversion of resources to afford organizational standing. *See, e.g., Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998); *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994). Thus, in some circuits, civil rights groups are increasingly reliant upon their members' standing for the enforcement of civil rights laws, including the Fair Housing Act.

Along with the direct damage to DRAC's (and other civil rights groups') ability to establish representational standing, the ability of DRAC to act as a private attorney general is also indirectly diminished by the Ninth Circuit's decision. Because litigation requires attorneys (who generally expect to be paid for their work) and because DRAC's payments to its lawyers are dependant upon its success in litigation, the decisions of the Ninth Circuit and the district court have contributed towards discouraging attorneys from representing DRAC in civil rights enforcement efforts.

2. An additional ground for granting the Petition exists where the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a) of the Rules of the Court.[1]

The record shows that the accepted and usual course of judicial proceedings has not been followed by the courts below as due process of law has (effectively) been denied to Mr.

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[1] *See also, Gibson v. Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357-358 (1956) (Justice Frankfurter, concurring) (The Court is empowered to grant certiorari to review rulings by courts of appeals "involving ordinary questions . . .which by themselves would never have warranted the granting of a writ [where the rulings] are so obviously and injuriously erroneous as to call for an exercise of this court's power of supervision.").

Mortenson and to this Respondent. While some technical formalities of due process have been accorded in this case, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Where courts take filing fees, accept briefs and conduct hearings without actually hearing a plaintiff's case, then the "opportunity to be heard" is flawed. While such failure is difficult to establish, a genuine "opportunity to be heard" is clearly absent: where the district court declares -- *sua sponte* – a new interpretation of law[2]; where the district court ignores allegations made in the First Amended Complaint in Intervention, and completely misstates what the plaintiff's counsel said at oral argument (Appendix J, *infra,* 49a-51a); where the district court dismisses under Fed.R.Civ.Pro. 12(b)(6) without giving leave to amend;[3] where oral argument before the Court of Appeals would lead any informed observer to conclude that the civil rights litigant's appeal would be successful (Appendix K, *infra*, 56a (comments of Judge Hug regarding statutory scheme) and 58(a) (comments of Judge Hug regarding intangible injuries)); and where the decision of

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[2] In this case, that physical "conditions" do not constitute "conditions" for the purpose of 42 U.S.C. § 3604(f)(2).

[3] And where the Court of Appeals faults the plaintiff for having "failed to move to amend" despite that court's precedent "that in dismissals for failure to state a claim, a district court should grant leave to amend *even if no request to amend the pleading was made*, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N.C. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990)(emphasis added). Judge Noonan, apparently believing that Mr. Mortenson was entitled to amend a *second* time (and *after* the entry of judgment without leave to amend) scolded Mortenson's counsel for not having given Judge Rawlinson (who at the time of oral argument was a judge of the Ninth Circuit) "a chance" and cast doubt on the likelihood of Mr. Mortenson getting "a chance" from the Ninth Circuit. Appendix K, *infra*, 55a.

the Court of Appeals is relegated to an unpublished opinion which may not be cited as precedent to the Court of Appeals.

CONCLUSION

The facts (which, in the context of a motion to dismiss, are the allegations of the complaint)and the law in this case are clear enough to warrant summary reversal of the decision at issue.

Alternative to summary reversal, this Court's precedents suggest a course of action that the Court has noted "can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court's] plenary review." *Lawrence v. Chater*, 516 U.S. 163, 168 (1996). That course of action is a "GVR order" where the Court grants certiorari, vacates the judgment below, and remands the case so that the Court of Appeals may decide it in light of an intervening event, such as a postjudgment decision of this Court. The intervening event in this case is this Court's recent decision in *United States v. Mead Corp.*, 533 U.S. __, 121 S.Ct. 2164 (2001) which noted that "*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and *given the value of uniformity in its administrative and judicial understandings of what a national law requires.*" *Id.* at 2175, *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (emphasis added).[4]

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[4] The Ninth Circuit did not address the persuasiveness of the *HUD Memorandum of February 20, 1997, issued by Sara Pratt, Director, Office of Investigations (Subject: Standing in Accessibility Cases in Light of Ricks v. Beta Development Co., 1996 U.S. App. LEXIS 19743 (9th Cir. Aug. 1, 1996)*, (Petition, Appendix G, 38a-41a). Also, two reported decisions of

In a case where the Court of Appeals has chosen to ignore the national policy of HUD regarding the enforcement of the Fair Housing Act in an *unreported decision*[5] that sustains the holding of a judge currently sitting on that Court of Appeals, and which, as noted, *supra*, effectively denies plaintiffs an opportunity to be heard, the benefits of a GVR order, as recognized in *Lawrence v. Chater*, are clear.

Respectfully submitted.

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the Ninth Circuit (*Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) and *Holley v. Meyer*, 2001 WL 856093 (9th Cir., July 31, 2001)) that were *authored* by the senior member of the panel that heard the case at issue clearly recognize the significance of HUD's interpretations of the FHA. Accordingly, the Ninth Circuit's failure to even address the HUD Memorandum can only be explained by its not being entitled to *Chevron* deference.

[5] This case does not involve the constitutionality of court rules (e.g. Ninth Cir. Rule 36-3) that prohibit citation to unpublished opinions as precedent, a topic which has engendered substantial scholarly comment since 1999 (and especially after the decision of the Eighth Circuit in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated en banc as moot, 235 F.3d 1054 (8th Cir. 2000)). It is clear enough, however, that a court's *de facto* ability (whether constitutional or not) to disregard its own decisions for the purposes of precedent weighs in favor of review of granting the Petition: "Nonpublication must not be a convenient means to avoid review." *Smith v. United States*, 502 U.S. 1017, 1020 n. (1991) (Justice Blackmun, dissenting).

APPENDIX J

CASE NO.: 99-16754

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff,

ALAN J. NOLD; AURORA NOLD;
Plaintiff-Intervenors, and

MARK MORTENSON
and DISABLED RIGHTS ACTION COMMITTEE,
a Utah nonprofit corporation,
Plaintiff-Intervenors-Appellants

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.; et. al.,
Defendants - Third-party Plaintiffs - Appellees, and

THE KEITH COMPANY; VTN
Third-party Defendants - Appellees.

CASE NO.: 99-16754
(An Appeal from the U.S. District Court for the District of Nevada)

BRIEF OF APPELLANT

* * * *

ARGUMENT

* * * *

D. The Court Ignored the Record Before It to Deny Mortenson's Standing Under 42 U.S.C. § 3604(f)(1)

The District Court's Order contains several declarations regarding Appellants' injury under § 3604(f)(1) which were clearly contrary to the statements of Appellants' counsel at the hearing. Such declarations were (1) that Appellants had "failed to allege that [they] were prospective buyers, or that but for the architectural barriers in the condominium, they would have purchased a unit," ER 20, and (2) that Appellants had "failed to allege that [they] had sufficient financial means to purchase a condominium." ER 21. Similarly, a declaration was made regarding causation: "[Appellants] do not allege that units at RSV #7 would satisfy their housing needs or that [they] have the means to purchase a unit at RSV #7." ER 22.

As was repeatedly stated by Appellants' counsel at the hearing, however, Mr. Mortenson was a prospective buyer of a condominium at RSV #7. First, at Pages 11-12 of the Transcript:

> THE COURT: Mr. Armknecht, though, is Mr. Mortenson alleging that he was a prospective buyer?
> MR. ARMKNECHT: Yes, Your Honor.
> THE COURT: Is - - where is that in the complaint?
> MR. ARMKNECHT: Okay. Sorry I didn't highlight it.
> THE COURT: Are you looking at the amended complaint or the original?
> MR. ARMKNECHT: Amended, Your Honor. Ah, top of page 4, paragraph 7, Your Honor. That Rock Springs Vista Number VII, the

condominium development visited by Mortenson during his search for suitable housing during 1995. If using the term "prospective buyer" is a key word, I admit it's not there, but that is what he was doing.
THE COURT: All right.

ER 13-14 (emphasis added).

Second, at Page 13 of the Transcript:

THE COURT : And Mr. Sheffer -- where was Mr. Sheffer living at that time?
MR. ARMKNECHT: He was living in Las Vegas, Your Honor.
THE COURT: Okay. And he -- and you're saying that he was a prospective buyer?
MR. ARMKNECHT: Yes, Your Honor. I have a statement to -- by a real estate agent who was working with him at the time to that effect as well.
THE COURT: And he was looking to buy as opposed to rent?
MR. ARMKNECHT: Both of them were looking to buy, Your Honor.

ER 15 (emphasis added).

Third, at Page 23 of the Transcript:

THE COURT: And what do you base the -- your view on that the occurrence is when it opens?
MR. ARMKNECHT: The occurrence of discrimination is when it -- but the -- actually the occurrence of the discrimination -- of the -- of the cause of action was when they came looking for housing and they found it to be inaccessible. That was -- that was when they

> became aggrieved person. That was when they were injured. It couldn't be before then.
> THE COURT. On that point, are you saying that the individual plaintiff interveners were ready, willing, and able buyers at that point?
> MR. ARMKNECHT. Yes, Your Honor.

ER 16 (emphasis added).

Despite the above-quoted statements made by Appellants' counsel at the hearing, the District Court's Order declares that "At the hearing, Plaintiffs also gave no indication that they would be able to allege sufficient facts so as to provide standing." ER 24. Such finding of fact is clearly erroneous and the decision of the District Court should accordingly be reversed and the case remanded for further proceedings.

E. The Court Should Have Allowed Appellants the Opportunity to Amend

Where a fair housing complaint's "extreme generality" makes it "impossible to say that [plaintiffs] have made factual averments sufficient if true to demonstrate injury in fact . . . the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982).

The Ninth Circuit has held "that in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Cook, Perkiss & Liehe v. N.C. Collection Serv., 911 F.2d 242 (9th Cir. 1990). Any deficiency in the First Amended Complaint in Intervention could have been cured by the allegation of additional facts regarding intent to buy a condominium and the financial ability to buy one. Despite the clear indications given at the hearing of the motion to dismiss, ER 13-16, the District Court did not grant

leave to amend. Such failure should be addressed by this Court: the District Court's dismissal should be reversed and the case should be remanded for further proceedings.

* * * *

Respectfully Submitted this 19th day of May, 2001.

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APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF
AND
MARK MORTENSON; DISABLED RIGHTS ACTION COMMITTEE, A
UTAH NON-PROFIT CORPORATION
PLAINTIFFS-INTERVENORS-APPELLANTS
v.
ROCK SPRINGS SPRINGS VISTA DEVELOPMENT; J.A. BLACK
CONSTRUCTION CO.; JAMES BLACK
DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLEES
AND
AURORA NOLD,
DEFENDANT-APPELLEE
THE KEITH COMPANY; VTN
THIRD-PARTY-DEFENDANTS-APPELLEES

No. 99-16754.
D.C. No. CV-01825-JBR (RLH)

Argued and Submitted Feb. 14, 2001.
Decided May 8, 2001.

Appeal from the United States District Court
for the District of Nevada
Johnnie B. Rawlinson, District Judge, Presiding.

Before HUG, NOONAN, and W. FLETCHER, Circuit Judges.

EXCERPTS OF ORAL ARGUMENT*

* These excerpts were transcribed from a tape recording of the proceedings by the respondent. No official transcripts of oral arguments are provided by the Ninth Circuit.

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JUDGE FLETCHER: Run me, run me through procedurally what happened. That is to say, there was a motion for summary judgment or a motion to dismiss?

Mr. Armknecht: A motion to dismiss, your honor.

JUDGE FLETCHER: Under 12(b)(6)?

Mr. Armknecht: There was never a motion. . . Yes, your honor, 12(b)(6).

JUDGE FLETCHER: And then what happened?

Mr. Armknecht: Then there was a hearing at which I clarified to the district court what was going on and the district court promptly issued a dismissal.

JUDGE FLETCHER: A dismissal?

Mr. Armknecht: Dismissal.

JUDGE FLETCHER: A dismissal, now dismissal pursuant . . . under 12(b)(6) . . .

Mr. Armknecht: Yes, your honor.

JUDGE FLETCHER: . . . or dismissal under summary judgment?

Armknecht: Dismissal under 12(b)(6), your honor.

JUDGE NOONAN: Did you then move to amend?

Mr. Armknecht: Ah, no, your honor, I . . . the Court clearly wasn't looking at the representations that we were making in . . . at oral argument. Ah, and . . .

JUDGE NOONAN: So you never made that motion to amend the second time?

Mr. Armknecht: No, your honor.

JUDGE NOONAN: Well, how come you didn't give the judge a chance to rule on it and then come up and ask us to give a . . . you a chance?

* * *

JUDGE HUG: I have to stop you there for a moment.

Mr. Ferrario: Yes, sir.

JUDGE HUG: What is the relationship of (f)(3) to (f)(2)?

Mr. Ferrario: (f)(3) is a delineation of what can be discrimination. Under (f)(3), we have in (f)(3)(C) – it is what he's bringing suit under -- is a failure to construct in an accessible fashion for lack of a better word. And that can be discrimination. No question. I mean, Congress has said that under (f)(3). But we have to go back and try to make sense out of this and what we try to do here is go back to the legislative history. Congress said that "section 3604(f)(2) would prohibit discrimination against the same persons (and there its referencing (f)(1)) in the terms, conditions or privileges or provision of services or facilities. This provision is intended to prohibit special restrictive covenants or other

terms and conditions or denials of service because of an individual's handicap which would have the effect of excluding congregate living arrangements, access to recreational facilities . . .

JUDGE HUG: Why do we have to go back to the legislative history? The statute seems pretty clear, doesn't it? You say "make sense out of it." I'm not really having much trouble making sense out of this statute.

* * *

JUDGE FLETCHER: Let's keep away from the "moving target." We're now talking with an amended complaint, we're talking about (f)(2), so let's just talk about (f)(2).

Mr. Ferrario: I . . . I'll do that because I'm going to go to the brief that was filed by Mr. Armknecht and when he describes the injuries involved in this case, he talks about "intangible injuries." "Intangible injuries" and when you read the cases dealing with standing and they talk about concrete and palpable injuries, I'm having a difficult time seeing how the injury, the intangible injury supposedly suffered by his client comport with the pronouncements of the Supreme Court and the circuit courts in regard to standing. And that's the point I wanted to make there. Um, that, and this is right out of his brief at page 5 when he describes his amended complaint that we're dealing here with "intangible injuries": page 5, under the description of events section. Um, and I don't think that section (f)(1) or section (f)(2) even if you read them broadly as some . . . as the Supreme Court cases would lend you to do . . . um, in terms of standing provide redress for simply "intangible injuries."

JUDGE NOONAN: As I understood Judge Posner's opinion, he said well, Congress can create standing and, uh, has done

it for testers. Because, obviously, the tester is not suffering any immediate economic harm personally, and so Congress has created for the tester a standing.

Mr. Ferrario: In the tester cases what you typically have if you go through the cases where tester standing has been allowed is a situation where its necessary to uncover a violation to have someone to pose as a buyer or renter to go in and ferret out discrimination . ..

JUDGE NOONAN: Well, supposing Mortenson is a tester. Why, why doesn't he qualify?

Mr. Ferrario: There is no reason here to employ tester liability. The discrimination he is talking about has nothing to do with any sort of affirmative representation that may or may not be made by the seller of the condominium. The steps in front of the condominium, if they bar accessibility are there, they're objective. There's no reason to employ a tester standing . . .

JUDGE NOONAN: Well, it's not a misrepresentation, but it is a discovery that this place doesn't have access.

Mr. Ferrario: But any person who is seeking housing in that context, be they of African-American descent, Mexican-American descent, handicapped or otherwise will be treated the same when they approach that step. There's no reason in this context to employ tester liability. You would be making an expansion -- or tester, excuse me, standing – you would be making an expansion of that doctrine beyond what I think it was intended to do if you look at the cases dealing with that. We're talking here about objective things. We're talking about construction of a dwelling and also if look at the Complaint and I was trying to do that today as I heard Mr. Armknecht articulate that now Mr. Mortenson is a tester

under (f)(2). I don't believe that they've alleged that in the Complaint. And I . . . I think again, we have to come back an try to make some sense out of this statutory scheme. And, I admit it's a difficult task.

JUDGE HUG: Let me . . . I don't know that its so difficult. I . . . it seems pretty clear. You say that, that "intangible damages" are not appropriate. What else could there be other than intangible damages? You haven't hurt the person. You haven't . . . there's been no physical damage. They're all intangible damages when there's a violation here.

* * *